Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

LORRAINE MOSER,
Administratrix of the Estate
of JENNIFER L. MOSER, deceased,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Federal Court err in preempting the appellants failure to warn claim pursuant to *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) and FMVSS 208 Option One, S4.1.2.1, where FMVSS 208 Option One does not mandate or suggest any written warning.

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Appendix B — Memorandum Opinion And Order And Judgment Of The United States District Court For The Northern District Of West Virginia Dated And Filed February 2, 2001 ..... 13a

Loraine Moser, Administratrix of the Estate of Jennifer Moser, deceased, respectfully requests that the Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits, an unpublished per curiam opinion is reproduced in Appendix A at 10-12. The opinion and order of the United States District Court for the Northern District of West Virginia is reported at 2001 WL 936346 (N.D. W. Va.) and is reproduced in Appendix B at 13a-28a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was issued on November 8, 2001. This court has jurisdiction under 28 U.S.C. § 1254(1).

REGULATION INVOLVED

S4.1.2.1 First option—frontal/angular automatic protection system. The vehicle shall:

> (a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;
>
> (b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) Either.

(1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No, 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

STATEMENT OF THE CASE

This case arises from the tragic death of Jennifer Moser. Lorraine Moser, the decedent's mother, contends that one of the causes of her daughter's death was an inadequate warning with regard to the seatbelt system employed by Ford Motor Company in its 1990 Escorts.

A. The Proceedings Below

This civil action was originally filed in the Circuit Court of Harrison County, West Virginia, by petitioner, Lorraine Moser, Administratrix of the Estate of Jennifer L. Moser, deceased. The petitioner brought this action against Ford Motor Company under theories of negligence; wrongful death; willful, wanton and reckless misconduct; and strict liability.

Thereafter, it was removed by the respondent to the United States District Court for the Northern District of West Virginia by assertion of diversity of citizenship. Prior to trial, the respondent moved for summary judgment on the issues of failure to warn about the limits of protection that the shoulder belt alone offered occupants; defective design of the restraint system; the respondent's duty to petition the government to change FMVSS 208; and the availability of punitive damages. The district court denied all of these motions except for Ford's duty to petition the government. Subsequently, and for the first time on the eve of trial, the respondent raised federal preemption as a defense. This defense was raised in a motion to dismiss. Before ruling on this motion, the district court chose to wait for the United States Supreme Court to render its decision in *Geier v. American Honda*. Thereafter, the district court granted summary judgment in favor of the defendant upon all of the state law claims alleged by the petitioner.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit claiming that the petitioners inadequate warning claims were not preempted under FMVSS 208. The Fourth Circuit held that Mrs. Moser's inadequate warnings claim was "at bottom" based upon a claim that the Escort's two-point system was unsafe without the use of the lap belt.

B. Statement of the Facts

On October 1, 1995, at approximately 2:35 a.m., Jennifer Moser received fatal head injuries after being partially ejected from the 1990 Ford Escort in which she was a passenger when the same was involved in a rollover accident on I-79 at the 109 mile marker. Jennifer was 19 years old at the time of her death.

The 1990 Ford Escort was equipped with an automatic shoulder belt, manual lap belt restraint system, commonly referred to as a two-point passive restraint system. The passive features of this particular type of restraint system included the motorized shoulder belt that would automatically engage when the door was closed and a knee bolster that was located in the lower part of the dash board. The shoulder belt was responsible for securing the upper part of the torso and the knee bolster was responsible for securing the lower part of the body in a crash situation. These two components of the restraint system are called "passive" because they required no action from the front occupants. Ford also placed a manual lap belt in the Escort which required the front occupants to manually buckle the same. The FMVSS required that, beginning in 1987, the passive restraint systems be installed in 10% of the new vehicles and that by 1990, 100% of the vehicles sold new would have the passive system. Prior to 1987, Ford chose the Escort as one of the vehicles that would receive the 2-point passive system beginning in 1987.

In 1967, twenty years before the first Escort was sold with the aforesaid system, Ford performed testing that established that the passive shoulder belt/knee bolster restraint system was a dangerous system in collision situations because the occupant may "literally hang himself" about the belt. In addition, on October 1, 1984, Ford received a letter from Ford of Europe concerning the 2-point shoulder belt/knee bolster system stating that in 1965 these systems became illegal for use in the Europe Market because the occupant would "submarine" under the belt (i.e., come out of the shoulder belt) during a collision due to the lack of knee or other contact/occupant retention devises to prevent this. On July 20, 1984, an internal Ford memo documents

that the 3-point passive belts were favored over the 2-point passive belt because the 3-point system injury rates and effectiveness estimates seemed to strongly favor the 3-point versus 2-point systems. Government research also indicated better effectiveness for 3-point verses 2-point passive belts. Ford had a very good 3-point system that could have been used at that time. As of August 30, 1984, Ford was planning to use the 3-point system in its vehicles, although the choice had not been finalized. At that time, the reliability and effectiveness of the 2-point system was yet to be determined by Ford, so they said, but in actuality, Ford knew this system was dangerous back in 1967.

Despite its knowledge of the dangers of the 2-point system, and the availability of the superior 3-point system, Ford nevertheless chose to install the 2-point system in the 1987 Escort.

After the 2-point system was installed in the 1987 Escort and put on the road, Ford immediately knew that the major problem with the 2-point passive system was that it did not promote use of the manual lap belt. The problem was the front occupants would forget to buckle the manual lap belt. Not only were 75% of the owners of the Escort forgetting to buckle their lap belts; high ranking Ford management employees were forgetting to buckle the manual lap belts; and Ford management lessees were forgetting to buckle the manual lap belts

Roger Maugh was director of the Automobile Safety Office at Ford. Despite the fact that Mr. Maugh was a regular seat belt user and had knowledge, training and experience with the 2-point system that far exceeded any knowledge, training and experience Jennifer Moser had with this system,

the system, admittedly, was designed so as to promote forgetting to use the manual lap belt, and this was true whether you were a learned management member of Ford or a 19 year old college student.

Recognizing this defect, Ford employed an informational system used inside the vehicle to educate, warn and remind occupants about the 2-point manual lap belt. After all the manual lap belt was an integral part of the restraint system.

While it was useful for this important information to be included in the Owner's Manual and warranty information, placing "warnings" in this material does not fulfill the requirements of reasonableness or prudence. It is ludicrous, for anyone to suggest that an occupant sits and reads the Owner's Manual and/or warranty information *each and every time* they enter the car for travel. Accordingly, to meet a reasonable and prudent standard, the warning information for the front occupants must be displayed prominently in front of both the driver and passenger and always serve to remind them *each and every time* they get in the car that there is a manual lap belt in the car; that they *must* use the lap belt and what the dangers and consequences of non-use are; and a reminder to use the lap belt.

With respect to the Ford Escort, the information system used in the 1987-1990 cars did not meet the ANSI standards. The proposed decal to be installed in the Escort that was recommended by the Ford Human Factors Group was a "big warning sign" that read:

WARNING

Not following these instructions will greatly increase the chance of severe injury in an accident:

- Be sure the shoulder belt release levers are down.
- Always fasten lap belt.

  If a lap belt cannot be worn, you must move the seat forward so your knees are close to the instrument panel.

See Section in your Owner's Manual for more information.

C.L. Knighton, Vice President of Small Car Engineering and Planning for Ford, objected to use of the proposed decal because he felt it would negatively impact Escort car sales. Mr. Knighton caused the "Important For Your Safety" decal to be used instead. Despite the fact that Ford knew in 1967 that the 2-point passive system was unsafe without the lap belt being used, Mr. Knighton stated that he did not want to communicate to consumers that the passive belt system was not safe without the lap belt. The educational, warning, and reminder system in the 1990 Escort was inadequate and defective. Despite the fact that Ford knew the education, warning, and reminder system was inadequate, as evidenced by the fact that Ford's own learned people forgot to buckle the manual lap belt, Ford did nothing to improve, alter or change the system for 1987-1990 model Escorts.

Jennifer Moser, like Roger Maugh, Ford management lessees, and 75% of Escort owners, forgot to buckle the

manual lap belt because there was nothing to educate, warn, remind her to do so, and in the early morning hours of October 1, 1995, Jennifer paid for this omission with her life.

REASON FOR GRANTING THE WRIT

I. There is a conflict among the circuits concerning preemption of warning claims after the *Geier v. American Honda* decision.

In *Geier v. American Honda Motor Co.*, 205 S. Ct. 1913 (2000) the court held that claims which stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress were preempted based upon conflict preemption. The *Geier* court found that criticism of the choice made by automobile manufacturers in complying with the FMVSS 208 passive restraint mandate was preempted because Congress' intent was to promote consumer acceptance of passive restraint systems.

The choices which were protected, dictated that an automobile manufacturer may comply with FMVSS 208 by adopting one of three options.

The vehicle that killed Ms. Moser was manufactured in accordance with FMVSS 208 option one, S4.1.2.1. Option one does not mandate or prohibit a warning label and is in fact silent on the warning. Ford Motor Company employed a warning which the petitioner alleged was inadequate. The circuits are split on the issue of whether an inadequate warning claim can survive preemption in light of *Geier.*

Since the *Geier* decision courts have been unable to apply conflict preemption in a uniform manner with regard to warnings. Instruction from this Court is sought.

The Fourth Circuit held that preemption of the petitioner's claim was justified because "at bottom", Mrs. Moser's inadequate warning claim is based upon the Ford Escort's two point belt system being unsafe without the lap belt.

The Sixth Circuit, in *Fisher v. Ford Motor Co.*, 224 F.3d 570 (6th Cir. 2000) held that a warning claim regarding an airbag warning was preempted because it was the sole warning desired by the Department of Transportation and not a minimum. The inadequate warning claim was subsequently dismissed.

The Sixth Circuit however, in *King v. Ford Motor Co.*, 207 F.3d 886 (6th Cir. 2000) held that an inadequate warning claim survived preemption because the warning's adequacy did not conflict with FMVSS 208.

The Eighth Circuit in *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398 (8th Cir. 2000) held that where FMVSS 108 did not require the use of reflective tape where there was no conflict between the FMVSS 108 and the plaintiff's common law claim for product liability because the federal standard neither required nor prohibited the use of reflective tape to make the defendant's trailers more conspicuous.

The Ninth Circuit in *Leipart v. Guardian Industries, Inc.*, 234 F.3d 106 (9th Cir. 2000) held that where the Consumer Product Liability Act required a label rather than a warning be attached to a glass shower door that there is no conflict between state common law warnings requirements and federal safety standards.

Due to the conflict between the Circuits in interpreting the breadth and scope of the *Geier* decision, consumers are left to wonder what the law is with regard to conflict preemption as it applies to warning claims. Certainly where the safety regulation is silent as to warnings, preemption cannot apply.

II. The Decision Of The Circuit Court Of Appeals Is Erroneous.

At its most fundamental level, the Fourth Circuit erred by not applying the basic guidelines of conflict preemption.

Geier teaches that the implied preemption question requires careful analysis of whether a particular common law claim would conflict with, or stand as an obstacle to accomplishing the purposes of, a particular Safety Act standard, here, FMVSS 208. Under West Virginia law, the liability of a manufacturer in a products liability action is determined by what a reasonably prudent manufacturer's standards should have been at the time the product was made. *See Morningstar v. Black and Decker Manufacturing Co.*, 253 S.E.2d 666 (W. Va. 1979). At the time this Escort was manufactured, Ford had knowledge that the two point passive belt employed was dangerous when a lap belt was not used in conjunction with it.

Geier strongly suggests that a minimum federal safety standard will rarely, if ever, impliedly preempt more rigorous common law safety obligations, particularly when, as here, the governing federal statute contains a common law remedial savings clause. Justice Breyer's majority opinion expressly noted that *Geier* "leaves . . . state tort law to operate . . . where federal law creates only a floor, i.e., a minimum safety standard." 120 S. Ct. at 1918.

FMVSS 208 is a minimum safety standard. When Ford Motor Company manufactured the vehicle at issue in 1990, FMVSS 208 did not require the use of a written warning for passengers in the front passenger seat of the subject vehicle. However, as Ford Motor Company acknowledged it was

common in the industry for manufacturers to add written warnings. There is no indication that federal regulators at NHTSA prohibited or even discouraged automobile manufacturers and users from voluntarily installing warning labels for front seat passengers for vehicles certified under FMVSS 208 S4.1.2.1 This confirms that prior to 1990 FMVSS 208 was simply a minimum federal safety standard. The Federal Motor Vehicle Safety Acts minimum standards are supplementary to the common law of negligence and product liability and not an exemption from common law liability. There is no actual conflict between FMVSS 208 and Mrs. Moser's common law claim because the federal standard neither required nor prohibited the use of a written warning label to make the danger of not using the manual lap belt evident to front seat passengers. In West Virginia under the holding of *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603 (W. Va. 1983), failing to warn falls under the use defectiveness category of defective products. Use defectiveness covers situations when a product may be safe as designed and manufactured, but becomes defective because of the failure to warn of dangers which may be present when a product is used in a particular manner. Clearly, where federal safety standard is silent as to warnings there can be no preemption. The petitioner's claim for inadequate warnings must therefore survive.

Certiorari jurisdiction is warranted to resolve this conflict, clarify the law and to correct this error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED NOVEMBER 8, 2001

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1303

LORRAINE MOSER, Administratrix of the Estate of Jennifer L. Moser, deceased,

Plaintiff-Appellant,

v.

FORD MOTOR COMPANY,

Defendant-Appellee,

and

ERICA KATHERYN GATES,

Defendant.

Appeal from the United States District Court
for the Northern District of West Virginia, at Clarksburg.
Irene M. Keeley, Chief District Judge.
(CA-97-194-1)

Appendix A

Argued: September 27, 2001

Decided: November 8, 2001

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

OPINION

PER CURIAM:

Lorraine Moser (Moser), as administratrix of the estate of her deceased daughter, Jennifer L. Moser, brought this action against Ford Motor Company. Jennifer Moser was killed when the 1990 Ford Escort in which she was a passenger ran off the road and rolled over. Moser alleged that the Escort's restraint system was defective and that the warnings regarding the use of that restraint system were inadequate. The district court granted summary judgment to Ford, stating that in light of *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), Moser's defective restraint system and inadequate warning claims are both preempted by Federal Motor Vehicle Safety Standard (FMVSS) 208. Moser appeals, arguing that these claims are not preempted. In addition, she argues that even if they are preempted, she has an alternative, non-preempted theory of recovery. For the following reasons, we affirm.

Appendix A

I.

On October 1, 1995, Jennifer Moser was riding in the passenger seat of Erica Gates's 1990 Ford Escort, which was traveling north on I-79 in West Virginia. At about 2:35 a.m., near the Lost Creek exit, the Escort ran off the road and rolled over. The Escort's automatic two-point shoulder harness was engaged, but Jennifer Moser was not wearing the manual lap belt. Tragically, she sustained fatal head injuries in the crash and died at the scene. Gates, who was wearing both her lap belt and the automatic shoulder harness, survived the accident.

The Escort was manufactured by Ford in August of 1989 and contained a two-point passive restraint system with a knee bolster and modified seat design. The Escort also had a manual lap belt. At that time, under FMVSS 208 automakers were required to outfit vehicles with restraint systems falling under one of several restraint system options. *See* 49 C.F.R. § 571.208 (1989). Under Option One, S4.1.2.1, the vehicle had to meet federal crash protection requirements with a completely passive restraint system that required no action by the vehicle occupants. The FMVSS did not dictate the specific passive system that should be used, but sought to encourage technological innovation by permitting automakers to develop any type of passive system, so long as that system would comply with the crash requirements of FMVSS 208. While automakers were permitted to develop any new systems, the Department of Transportation listed and discussed the fully passive systems that appeared to have promise at the time of the rulemaking. These options

consisted of a two-point system with knee bolster, a three-point system, an airbag system, and a passive interior system. *See* 49 Fed. Reg. 28965 (1984).

Manufacturers could also certify vehicles under Option Two, S4.1.2.2, or Option Three, S4.1.2.3. Under Option Two the vehicle had to meet crash requirements with a restraint system that was partly automatic and partly manual. Option Three consisted of manual lap and shoulder belts with a seat belt warning system. Ford certified the Escort's restraint system under Option One, without the manual lap belt. Accordingly, the manual lap belt in the Escort was an additional safety feature permitted, but not required, by the Option One certification.

Moser sued in West Virginia state court, and Ford removed the case to federal court. As her primary theory of recovery, Moser argued that the Escort's two-point passive system was inherently faulty because such a system was inadequate to protect an occupant in the event of a rollover crash. Moser claimed that the Escort's two-point restraint system could be rendered safe and non-defective only with the use of a manual lap belt or a three-point passive system. Moser seeks to characterize her argument as one that this Escort's particular two-point passive system was defective, not that all two-point passive systems are defective. However, the defects she identifies in this particular two-point passive system, with the exceptions noted below and discussed in part IV *infra*, are universal to all two-point passive systems. Thus, despite Moser's attempt to characterize her primary claim as specific to this particular two-point system, this claim is in effect an attack on two-point passive systems

generally. As an alternative theory, Moser also pointed out several defects unique to this particular two-point passive system; she argued that the shoulder anchors were improperly placed and that the seat design and knee bolster were defectively designed. Additionally, Moser argued that Ford's warning to occupants to use the lap belt was inadequate.

During the pretrial phase of the proceedings, Moser notified the district court that the Supreme Court had granted certiorari in *Geier v. American Honda Motor Co., cert. granted*, 527 U.S. 1063 (1999), and indicated to the court that *Geier* "will no doubt . . . decide[]" the issues presented "in this matter." Accordingly, the district court delayed its ruling on Ford's motion to dismiss pending the resolution of *Geier*. After the Supreme Court ruled in *Geier*, Ford filed a renewed motion to dismiss. The district court considered the motion in light of the significant discovery that had already occurred and treated the motion as one for summary judgment. The court granted Ford's motion, ruling that in light of *Geier* Moser's primary claims were preempted by the FMVSS. The district court also dismissed Moser's alternative defect theories, reasoning that Moser's own expert had ruled them out. Moser appeals.

II.

We first address Moser's primary claim, which is essentially that two-point passive restraint systems are inherently defective unless a manual lap belt is used. Because *Geier* did not involve this precise issue, we examine *Geier* to determine whether its preemption holding is applicable in this case.

Appendix A

In *Geier* the plaintiff, Alexis Geier, sued Honda under District of Columbia tort law. Geier was injured when her 1987 Honda Accord crashed, even though she was wearing the manual lap and shoulder belts provided in the vehicle. Geier claimed that her vehicle was defectively designed because it lacked a driver's side airbag. The Supreme Court held that this claim was impliedly preempted because it "actually conflict[ed] with FMVSS 208." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 874 (2000). The Court explained that FMVSS 208 "deliberately provided the manufacturer with a range of choices among different passive restraint devices." *Id.* at 875. According to the Court, the manufacturer's ability to choose among different passive restraint devices promoted FMVSS 208's safety objectives: allowing a range of choices would encourage technological development, lower costs, facilitate widespread consumer acceptance, and permit the development of data on the relative efficacy of various passive systems. *Id.* at 875, 878-79. Thus, the Court explained that the FMVSS sought not only variety as between, say, Option One (fully passive) and Option Two (part passive, part active) systems, but also sought "a mix of several different passive restraint [Option One] systems." *Id.* at 878. FMVSS 208 "embodies the . . . policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Id.* at 881 (quoting Brief for United States as *Amicus Curiae* 25). The Supreme Court characterized Geier's tort suit as an attempt to impose a duty on manufacturers to install an airbag, rather than other passive restraint systems, in every vehicle. *Id.* at 881. This, the Court held, "would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.*

Appendix A

Moser argues that her claim is that this Escort's particular two-point passive system is defective, not that all two-point passive systems are defective. But regardless of whether Moser claims to be criticizing this particular two-point passive system rather than two-point passive systems generally, if the defects she identifies in this particular system are universal to all two-point passive systems, then her claim amounts to an attack on two-point passive systems generally. In fact, with the exceptions discussed in part IV *infra*, Moser's criticisms of this system are equally applicable to all two-point passive systems. Therefore, Moser's argument that this two-point system is unsafe without the use of an automatic or manual lap belt amounts to an argument that Ford should have chosen another system, specifically, a three-point passive system or an Option Two part-passive, part-active system.

Insofar as Moser claims that any two-point passive restraint system is inherently unsafe and defective, her claim, if successful, would exclude that type of system from the range of available passive systems. Both Geier's and Moser's claims would frustrate the Department of Transportation's goal of promoting a variety and mix of passive devices. As the Supreme Court explained, Geier's claim would totally frustrate that goal by imposing a uniform airbag requirement on all vehicles. In contrast, Moser's claim would only partially frustrate the goal. It eliminates one of the possible types of passive restraint systems, thus reducing the available variety by one, but still permits any other passive system options.

We are therefore presented with the question of whether this more limited interference with the objectives of FMVSS 208 causes FMVSS 208 to preempt Moser's claim. We need not decide whether allowing a single state tort lawsuit to exclude one type of passive system so frustrates the goals of FMVSS 208 as to require preemption, because the potential cumulative effect of such suits could completely frustrate the goals of FMVSS. While Moser's suit seeks only to exclude one type of passive restraint system, the two-point passive system, similar state tort actions could likewise seek to exclude another specific type of passive system, then another, then another. While no one claim would result in a complete frustration of the goal of permitting a mix of passive systems, the net effect of state tort law could be to exclude most or all of the passive systems that were available to manufacturers in 1989. This would frustrate the goals of FMVSS 208 just as completely as Geier's suit to impose a uniform airbag requirement frustrated those goals. Accordingly, we hold that FMVSS 208 preempts Moser's claim that a two-point passive restraint system is inherently defective.

III.

Moser also appeals the district court's dismissal of her inadequate warning claim. Moser argued in the district court that the sign on the Escort's visor warning the passenger to buckle the manual lap belt was inadequate. The district court held that this claim was preempted under *Geier*, just as the underlying choice of restraint systems claim was preempted. We affirm, albeit on slightly different reasoning.

Appendix A

As part of this claim, Moser alleges that Ford had a duty to warn occupants of the Escort that the car was not safe unless the occupant fastened the manual lap belt. If Ford had no such duty, the claim fails. Needless to say, Ford could only have such a duty if it were *true* that the car was unsafe unless the lap belt was used. Moser's inadequate warning theory is, at bottom, based on a claim that the Escort's two-point passive system was unsafe without the use of the lap belt. As we have explained above, that claim is preempted by the FMVSS under *Geier*. Because we are precluded in this case from finding any duty on Ford's part to provide the manual lap belt, Ford can have no corresponding duty to warn occupants to use the lap belt. Accordingly, Moser's inadequate warning claim fails as a matter of law.

IV.

Finally, Moser argues that she should be permitted to pursue an alternative, non-preempted theory of liability. She argues that apart from the inherent defectiveness of any two-point passive system, this particular two-point passive system was faulty in design. For example, in her brief Moser argues that the location of the anchor points and the design of the seat and the knee bolster were all defective. We agree that according to *Geier* claims based on such alternative theories of defective design, as opposed to defective choice of restraint system, are not preempted by FMVSS 208. While such claims are not preempted, the question remains whether the district court erred in granting summary judgment in this case.

Appendix A

To survive summary judgment, Moser must present evidence to create a "genuine issue as to material fact" as to whether any of these alleged defects were present and caused or contributed to Jennifer Moser's death. Fed. R. Civ. P. 56(c). While the party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact, Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Moser repeatedly mentions alleged defects in the placement of the shoulder belt and the design of the seat and knee bolster in her briefs, but she cites only one place in the record containing evidence in support of these claims. William Muzzy III, one of Moser's expert witnesses, testified in a deposition that "if the shoulder belt had been back, or if it had been designed to be, say, on the seat, then it would have certainly contributed to holding her upper body in place." After combing the record ourselves, we have found only one other statement by Muzzy (or anyone else) that could support a design defect theory: earlier in the same deposition, Muzzy stated, "[t]he shoulder belt portion of it, by its very nature, is forward of the shoulder and does not capture the shoulder in quite a few of the accident sequences."

Both prior to and following these two statements, Muzzy repeatedly and explicitly testified that, *in this accident*, any such defects — the placement of the shoulder harness, the design of the seat or the knee bolster — did not cause or

contribute to Jennifer Moser's injuries or death. When Ford's counsel asked Muzzy whether "the deficiency which you contend is in the shoulder belt, is really irrelevant to your opinions as to the cause of her injuries and death in this case," Muzzy responded "Yes." At another point, Muzzy clarified that "the seatback in this case did not fail." Muzzy also testified that he had not investigated the seat bottom, so he could offer no opinion regarding that part of the vehicle. Later, Ford's counsel repeated that "the only defect with regard to the system which you believe caused or contributed to her death in this case was the lack of a lap restraint in this accident for Jennifer Moser," and Muzzy said, "That's right." Muzzy gave similar statements at numerous other points in his deposition, and Moser's counsel did not ask Muzzy follow-up questions to challenge or question his clear testimony that none of these defects caused or contributed to Jennifer Moser's injuries or death in this accident.

Moser simply failed to present evidence sufficient to create a genuine issue of material fact as to whether any such design defects, if present in this car, caused or contributed to Jennifer Moser's injuries or death. In fact, Moser's own expert affirmatively confirmed that these defects did not cause or contribute to Jennifer Moser's injuries or death. Accordingly, we affirm the district court's dismissal of Moser's alternative design defect claim.

V.

In light of *Geier*, Moser's choice of restraint systems theory is preempted by the FMVSS. Similarly, Moser's inadequate warning claim fails as a matter of law because it necessarily depends on the existence of a legal duty that we are precluded from imposing. Finally, Moser failed to present sufficient evidence to raise a genuine issue of material fact on her alternative design defect theories. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA DATED AND FILED FEBRUARY 2, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA DATED AND FILED FEBRUARY 2, 2001

CIVIL ACTION NO. 1:97CV194
(Judge Keeley)

LORRAINE MOSER, Administratrix of the Estate of Jennifer L. Moser, deceased,

Plaintiff,

v.

FORD MOTOR COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, Lorraine Moser ["Moser"], as the administratrix of the estate of her deceased daughter, Jennifer L. Moser, brought this suit against Ford Motor Company ["Ford"] alleging that the seat belts in the 1990 Ford Escort in which Jennifer was a passenger were defective and the warnings regarding the seat belts were inadequate. Ford has renewed its Motion to Dismiss [Docket No. 185], arguing that Moser's claims are preempted by Federal Motor Vehicle Safety Standard ["FMVSS"] 208, 49 C.F.R. § 571.208, S4.1.2.1,

S4.1.3.3, S4.5.3.(b), and the National Traffic and Motor Vehicle Safety Act ["Safety Act"], 49 U.S.C. § 30103(b) and (e).[1] For the reasons set forth in greater detail below, the Court GRANTS defendant's renewed motion to dismiss.

FACTUAL BACKGROUND

Jennifer Moser was a passenger in the front of Erica Gates' 1990 Ford Escort on October 1, 1996,[2] traveling north on Interstate 79. At approximately 2:35 a.m., near the Lost Creek, West Virginia exit of the Interstate, the Ford Escort went off the road and rolled over. Jennifer Moser sustained fatal head injuries and died at the scene. At the time of her death, she was wearing an automatic or passive shoulder restraint but her manual lap belt was unfastened. Erica Gates, the driver, was wearing both her lap and shoulder belt and survived the accident with minor injuries.

The parties agree that Ms. Gates' Ford Escort was manufactured in August of 1989 and contained an "Option One" restraint system. Standard 208, S4.1.2.1 (frontal/angular automatic protection system). An Option One restraint system

1. The NTMVSA was re-codified from Title 15 to Title 49 of the United States Code in 1994. The Act's preemption clause was re-codified from 15 U.S.C. § 1392(d) to 49 U.S.C. § 30103(b)(1) and the Act's saving clause was re-codified from 15 U.S.C. § 1397(k) to 49 U.S.C. § 30103(c), with some changes.

2. Plaintiff's amended complaint states that the accident occurred on March 23, 1996. However, the accident report attached to plaintiff's response to defendant's motion for partial summary judgment [Docket No. 110] confirms that the accident occurred on October 1, 1995.

requires that both driver and front passenger seating positions meet frontal crash protection requirements by means that require no action by the vehicle's occupants. *Id.* The restraint system consisted of a motorized two-point shoulder harness, knee bolster and modified seat design which complied with all of the federal motor vehicle safety standards and mandated crash tests. Furthermore, the manual lap belt was not required by Standard 208 but was voluntarily provided by Ford. The passive restraint system, without a lap belt, was tested and certified to be in compliance with Standard 208.[3]

PROCEDURAL HISTORY

In her amended complaint and throughout the course of this litigation, plaintiff has made two specific claims against Ford:

(1) Ford's choice of restraint system was defective; and

(2) Ford failed to warn the front passenger that its restraint system was defective.

For example, plaintiff stated in her response to defendant's first motion to dismiss on the grounds of preemption that the case of *Geier v. American Honda*, 166 F.3d 1236 (D.C. Cir. 1999), then pending before the

3. *See* Howard Slater's affidavit, attached to Ford's renewed motion to dismiss. Although given the opportunity to contest the statements of Mr. Slater, a Ford design analysis engineer, plaintiff did not dispute his description of the restraint system or Ford's compliance with the requirements for Option One under Standard 208.

United States Supreme Court, "squarely presents . . . the exact issue that this Court is faced with which is whether the 'choice' of a seat belt system is defective." Response at 2.[4] Plaintiff's experts have also understood throughout this litigation that this "defective choice" claim was central to plaintiff's theory of her case.

Plaintiff's expert witness, William H. Muzzy, III, opined in his October 23, 1999 deposition that Jennifer Moser's failure to fasten her lap belt proximately caused her death and that Ford was at fault for choosing a system that did not promote use of the lap belt. Mr. Muzzy further stated that other aspects of the restraint system, which he had previously criticized, such as the placement and/or design of the shoulder belt, seat cushion, seat back, and knee bolster, did not cause or contribute to Jennifer's injuries. Deposition at 35. He resisted the efforts of counsel to have him discuss the alleged flaws in each component part of the restraint system, reiterating instead that "it was a passive system that they used that did not promote use of a lap belt." *Id.*

Plaintiff's other experts have similarly opined that the restraint system chosen by Ford was inadequate. "It must be my opinion that the passive shoulder belt/active lap belt with or without a properly [sic] knee bolster is an inadequate restraint system and is defective, or not safe for its intended use." Opinion letter of R.R. Haynes, dated December 13, 1998.

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4. *See also* plaintiff's amended complaint and plaintiff's opposition to defendant's motion for summary judgment (setting forth plaintiff's claim that Ford chose a defective system).

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Plaintiff's second claim regarding Ford's failure to warn was based on the alleged failure of Ford to promote the use of the manual lap belt by front seat passengers, by failing to advise them of the risk of serious injury or death if the lap belt was not used. As Mr. Muzzy stated in his deposition, it was plaintiff's contention that Ford should either have provided a better warning or reminder system regarding the use of the lap belt by front seat passengers, or it should have implemented a three-point restraint system, i.e. chosen a different type of restraint system. Deposition at 37.

On January 26, 2000, at the conclusion of a *Daubert/ Kumho* hearing, Ford raised the issue of whether plaintiff's claims were preempted by Standard 208. Ford had previously raised preemption as an affirmative defense in its answer, but had not raised the issue in its motion for partial summary judgment. The following day Ford filed its first motion to dismiss on the ground that plaintiff's claim that Ford had chosen the wrong type of restraint system was preempted by Standard 208 and the Safety Act. Plaintiff filed her response to the motion on January 28, 2000, arguing, first, that Ford had waived the affirmative defense and, second, that the Court should delay its decision on the motion, pending the Supreme Court's ruling in *Geier.* Because Ford raised preemption as an affirmative defense in its answer and did not otherwise waive this defense, plaintiff's waiver argument lacks merit; however, given the similarity of the issues pending before the Supreme Court in *Geier* and the issues presented in this case, the Court delayed its ruling.

Following the Supreme Court's ruling in *Geier v. American Honda,* 529 U.S. 1913 (2000), on May 22, 2000,

Ford filed a renewed motion to dismiss. Plaintiff responded and both parties have had an opportunity to file written statements with the Court confirming and clarifying the nature of the restraint system used in Ms. Gates' 1990 Ford Escort, as discussed *supra*. In her response brief, plaintiff urges the Court to be wary of *Geier* and seeks to re-characterize her theory of the case as being a defective engineering/defective warning case, rather than a defective choice/defective warnings case.

STANDARD OF REVIEW

Although Ford's motion is styled as a motion to dismiss, the parties have provided the Court with affidavits and excerpts of deposition testimony, which the Court has considered along with the parties' prior pleadings and the reports prepared by plaintiff's experts. Rule 12(b) of the Federal Rules of Civil Procedure provides that if matters outside the pleading are presented to and considered by the Court, the motion shall be treated as one for summary judgment. Accordingly, the Court will treat the renewed motion to dismiss as a motion for summary judgment, pursuant to Rule 56. *See generally*, *Laughlin v. Metropolitan Washington Airports Auth.*, 149 F.3d 253, 260-61 (4th Cir. 1998). The parties have had a full and fair opportunity to present all material pertinent to the motion to the Court. In fact, the Court requested additional information about the restraint system in question from the parties upon completion of the briefing of the motion to dismiss and both parties responded to the request.

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Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to material fact and the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of showing the absence of any issues of material fact. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986).

However, Rule 56 mandates that summary judgment be entered, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Furthermore, as the United States Supreme Court noted in *Anderson v. Liberty Lobby, Inc.*, Rule 56 provides that "a party opposing a properly supported motion for summary judgment 'may not rest upon mere allegations or denials of [the] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." 477 U.S. 242, 256 (1986).

There is no issue of fact in this case as both parties agree on the type of restraint system used in the 1990 Ford Escort at question. The Court has before it only the legal issue of whether plaintiff's claims, as asserted throughout the litigation prior to the Supreme Court's ruling in *Geier,* are preempted by federal law.

Appendix B

ANALYSIS

In *Geier*, the Supreme Court resolved a split between the federal circuit courts of appeals and state courts as to whether the Safety Act and Standard 208 expressly or impliedly preempt claims that a car manufacturer made an inappropriate choice in selecting an occupant restraint system, where the manufacturer selected one of the three options provided for in Standard 208. While federal courts had routinely determined that such claims were preempted, state courts had frequently found no preemption and allowed them to proceed. *See e.g. Irving v. Mazda*, 136 F.3d 764 (11th Cir. 1998); *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996); *Perry v. Mercedes-Benz*, 957 F.2d 1257 (5th Cir. 1992); *Porkony v. Ford Motor Co.*, 902 F.2d 1116 (3rd Cir. 1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988); *Gills v. Ford Motor Co.*, 829 F.Supp. 894 (W.D. Ky); *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 379 (N.Y. 1998); *Minton v. Honda of America*, 684 N.E.2d 648 (Ohio 1997); *Munroe v. Galati*, 938 P.2d 1114 (Ariz. 1997); *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1996); and *Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995).

The Supreme Court in *Geier* determined that the Safety Act's preemption provision, 15 U.S.C. § 1392(d), did not expressly preempt "wrong choice" lawsuits, in light of its savings clause, 15 U.S.C. § 1397(k).[5] 120 S.Ct. at 1917. However, it further concluded that the savings clause does

5. The Supreme Court referred to the pre-1994 version of the Safety Act to be consistent with the lower courts' rulings and the pleadings filed by the parties.

not bar the ordinary working of conflict preemption principles, and that the claims raised by Alexis Geier actually conflicted with both Standard 208 and the Safety Act itself. *Id.* at 1918.

The plaintiff in *Geier* sued Honda claiming, among other things, that Honda had designed its 1987 Honda Accord negligently and defectively because it lacked a driver's side air bag. *Id.* Similarly, the essence of the plaintiff's claim in this case is that Ford negligently and defectively designed the 1990 Ford Escort because it chose to install an Option One restraint system, with a passive shoulder belt restraint and a manual lap belt, rather than selecting a different type of passive restraint system. Plaintiff alleges that Ford was aware that the half-passive/half-active system gave occupants a false sense of security regarding whether they were buckled in, causing occupants to leave their lap belt undone, and that there were other safer restraint systems that Ford could have chosen. In other words, Ford made a "wrong or defective choice" in selecting an Option One system.

Before concluding that the plaintiff's "no air bag" claim in *Geier* actually conflicted with Standard 208, the Supreme Court examined the history behind Standard 208 and concluded that the Department of Transportation ["DOT"] had deliberately provided manufacturers with a range of choices among different passive restraint devices. *Id.* at 1922. The DOT intended that "those choices would bring about a mix of different devices introduced gradually over time; and [Standard] 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance

— all of which would promote [Standard] 208's safety objectives." *Id.* at 1922.

The Supreme Court further found that the DOT standard deliberately sought variety by providing for a mix of passive restraint systems with performance requirements for such passive restraint devices. The DOT had rejected a proposal that would have required all vehicles to be equipped with air bags because it feared a public backlash similar to that over the interlock and continuous buzzer devices it had previously mandated in 1974. In addition to providing consumers with choices, the mix of passive restraint devices was also intended to help develop data on the comparative effectiveness of the different restraints, thereby facilitating the development of alternative, cheaper and safer passive restraint systems. *Id.* at 1924.

As in *Geier,* if plaintiff's suit in this case was not preempted and Ford was found to have made a "wrong choice" in the system it selected, such result would preclude manufacturers from developing Option One restraint systems, in direct conflict with Standard 208 which intentionally gave manufacturers the flexibility to choose between different passive restraint systems. Plaintiff's attempt, following the Supreme Court's ruling in *Geier*, to alter her theory of the case and now argue that she was claiming all along that the issue was not the choice of restraint system but rather the actual design of the particular Option One system, is unavailing. Plaintiff's experts, particularly Dr. Muzzy, have clearly opined that Ford made a "defective choice" in putting a half-passive/half-active restraint system in the 1990 Ford Escort and that it was Jennifer Moser's failure to buckle her

lap belt that proximately caused her death. Dr. Muzzy has stated that alleged defects in the other components of the passive restraint system (seat cushion, knee bolster, seat back, etc.) did not proximately cause her death. Plaintiff cannot now try to reformulate her claim to survive preemption post-*Geier.*

Plaintiff's contention that her failure to warn claim survives *Geier* also fails. Plaintiff has argued that Jennifer Moser failed to fasten her manual lap belt on October 1, 1995 because Ford failed to provide adequate warnings or reminders to the front passenger to buckle up. Plaintiff's claim fails as a matter of law because Standard 208 did not require Ford to include a manual lap belt with its all passive restraint system, under Option One.

In a case decided before the Supreme Court issued its ruling in *Geier,* the Sixth Circuit upheld a jury verdict against Ford in a case involving claims similar but distinguishable from those raised in the case at bar. *King v. Ford Motor Co.*, 209 F.3d 886 (6th Cir. 2000). King, an avid seat belt user, was a front passenger in a friend's 1992 Ford Escort when she was killed in an accident following a collision with a pick-up truck. The 1992 Ford Escort had a two-point motorized shoulder belt, a knee bolster and a manual lap belt. The case went to the jury on two theories: that the automatic seat belt restraint system was defective and unreasonably dangerous to the consumer and that Ford failed to warn its consumers of the potential dangers associated with the restraint system. *King*, 209 F.3d at 591. The jury found for the plaintiffs and the Sixth Circuit affirmed on appeal.

However, the 1992 Ford Escort in *King* was manufactured after September 1, 1989 and had an Option Two restraint system. Erica Gates' 1990 Ford Escort was manufactured in August 1989 and had an Option One complete passive restraint system, with an added manual belt. Furthermore, the *King* plaintiffs, unlike the plaintiff in the case at bar, did not allege a defective choice of restraint system claim, but rather that the specific design of the restraint system in question was defective (failure to use load limiters, position of knee bolster and position of belt anchor). Finally, their failure to warn claims dealt with a manual lap belt that was an integral part of the restraint system, rather than, as here, a manual lap belt that was not a required component of the restraint system. Penalizing a manufacturer for adding a safety feature, such as a manual lap belt, by imposing liability for allegedly inadequate warnings regarding such additional feature would be contrary to Standard 208's policy of promoting safety through flexibility.

Subsequent to *Geier,* the Sixth Circuit again addressed the adequacy of warnings in a Ford vehicle. *Fisher v. Ford Motor Co.*, 224 F.3d 570 (6th Cir. 2000). In *Fisher*, the plaintiffs alleged that the warnings regarding the dangers of air bags to drivers of short stature in a 1996 Ford Sable were inadequate. The appellate court held that the warning language for air bags in Standard 208 sets forth the sole warning wanted by the DOT, and not a minimum. The DOT feared dilution of the information in the required warning because of consumer "information overload," causing consumers to be distracted by the additional warnings from paying attention to the critical information. *Fisher*, 224 F.3d at 573-74. The Sixth Circuit noted that its ruling was limited

to finding that a claim regarding additional and different warning labels would be preempted but did not reach the issue of whether a claim regarding additional, identical labels would also be preempted.

In another analogous case, the Eleventh Circuit confirmed the continued vitality of *Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir. 1998) post-*Geier,* and held that a plaintiff's claims that a 1994 Mazda Protege's manual lap belt had been defectively designed and that Mazda had negligently failed to warn consumers that the Protege was dangerous unless the manual lap belt was worn were preempted. *James v. Mazda Motor Corp.*, 222 F.3d 1323, 1324 (11th Cir. 2000).[6]

As the Supreme Court has made clear in *Geier,* courts should apply normal preemption principles in determining whether a state common law action would stand in the way of the accomplishment and exhaustion of the objectives of Congress. Because plaintiff's defective choice of restraint system and failure to warn claims directly conflict with the objectives of Congress, as set forth in the Safety Act and Standard 208, such state law claims are preempted.

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6. The 1994 Mazda Protege, like the 1990 Ford Escort in the case at bar, employed a passive (automatic) two point shoulder belt and a manual lap belt. However, it is not clear from the decision whether the Mazda restraint system was certified under Option One or Option Two of Standard 208.

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CONCLUSION

Accordingly, for the foregoing reasons, the Court GRANTS defendant's renewed motion to dismiss and DISMISSES WITH PREJUDICE this case from the docket of the Court.

It is so ORDERED.

The Clerk is directed to transmit copies of this Order to all counsel of record.

Dated: February 2, 2001

s/ Irene M. Keeley
Irene M. Keeley
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

Case Number 1:97CV194

LORRAINE MOSER,

Plaintiff,

vs.

FORD MOTOR COMPANY

Defendant

JUDGMENT IN A CIVIL CASE

* * *

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The defendant's motion to dismiss is granted;

This civil action is dismissed with prejudice and

retired from the docket of this Court.

Appendix B

WALLY EDGELL, Ph.D.,
Clerk

By s/ illegible
Deputy Clerk

February 2, 2001